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No. 79-2006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

LLOYD BARRENTINE, CLYDE G. EDWARDS, CLEO KEENEY, MAXIE BLANTON, JOHNNY ROBINSON, CHARLEY DEATON, H.E. MITTCHELL, AND L.R. YOUNG,
Petitioners,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN, LOCAL 878, AND A.J. PICKERING, PRESIDENT,
Respondents.

RESPONSE OF ARKANSAS-BEST FREIGHT SYSTEM, INC. TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ADDITIONAL STATUTES INVOLVED

The Fair Labor Standards Act, 29 U.S.C. §255, provides, *inter alia,* that:

> "Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid

minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act-

> (a) if the cause of action accrues on or after May 14, 1947-may be commenced within two years after cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arriving out of a willful violation may be commenced within three years after the cause of action accrued;"

The Fair Labor Standards Act, 29 U.S.C. §216(b), provides, *inter alia,* that:

> "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and then an additional equal amount as liquidated damages . . . . No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."

The Fair Labor Standards Act, 29 U.S.C. §256, provides, *inter alia,* that:

> "In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended, . . . shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, . . . it shall be considered to be commenced in the case of any individual claimant-

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear-on the subsequent date on which such written consent is filed in the court in which the action was commenced."

SUPPLEMENTAL STATEMENT OF THE CASE

A. Suplemental Facts.

There are some records pertaining to the grievance proceedings which were introduced in evidence at the trial. Included among such records is a copy of the grievance as filed by the petitioner, Barrentine, which reflects that the grievance was based on a violation of Article 50 of the Collective Bargaining Agreement and "Federal Wage Laws also state that this is compensable time."

Contrary to petitioners' statements at page 4 of the Petition For a Writ Of Certiorari, Arkansas-Best Freight System, Inc. has not conceded and does not concede that only the contractual claim as submitted to, or considered by, the Grievance Committee. Arkansas-Best Freight System, Inc. is not aware of any concession by Local 878 that only the contractual claim was submitted to, or considered by, the Grievance Committee.

B. The Proceedings Below.

The Complaint alleges the first cause of action is based upon violations of Fair Labor Standards Act for failure to pay the minimum wage for time worked by

the petitioners. The Complaint at count 8 states that the plaintiffs and others similarly situated had repeatedly sought full and fair representation of their grievance "as outlined above" from and by Local 878 and had been denied such. The grievances as outlined above included the allegation of the violation of the Fair Labor Standards Act.

Nowhere in the proceeding below, either at the district court level or at the circuit court level, did the plaintiffs ever assert that the grievance committee did not consider and rule on the FLSA claims.

The Answer of Arkansas-Best Freight System, Inc., Article II, objected to the standing of the plaintiffs to maintain the action because plaintiffs failed to file written consents to become parties to the action as required by 29 U.S.C.§ 216(b). The plaintiffs at no time, either before or after filing the Complaint, filed any written consents as required by 29 U.S.C. §216(b). The defendant, Arkansas-Best Freight System, Inc., renewed its objection at trial, which objection was denied. The objection was also raised in the Pre-Trial Stipulation.

The Court of Appeals was not at all troubled with respect to the handling of the four petitioners who did not file grievances. It said that, "Those holdings might well give us trouble here. . . except for the manner in which the case was handled in the District Court." It was not only the failure of the trial counsel for petitioners to object that lead the Circuit Court to affirm the treatment of the four who had filed grievances, but also because:

> "Appellate counsel have not undertaken in connection with this appeal to differentiate the count one claims of Barrentine in this case from the count one claims of the other four plaintiffs." 26(a)

REASONS FOR NOT GRANTING THE WRIT

The Decision Below Is Not Inconsistent With Decisions Of This Court And Does Not Conflict With Decisions Of Other Circuits And Will Not Interfere With The FLSA.

1. The petitioners voluntarily submitted the FLSA claim to the Grievance Committee for determination along with the contract violation claim and both issues were resolved. The four petitioners who did not file grievances expressly agreed at trial that their claims were based on the same claims as were the petitioners who had filed grievances and should be treated the same.

The decision of the 8th Circuit in no way results in forcing or compelling workers who did not intend to submit their FLSA claims to Grievance Committees but applies only where the submission has been voluntary. (P.23a)*

Even where the submission has been voluntary, the 8th Circuit as well as the trial court acknowledge the obligation and right of the judiciary to review the fairness of the grievance proceedings to insure that the result achieved falls within the guidelines of *Heinz* v. *Anchor Motor Freight Inc.*, 424 U.S. 54, 96 S. Ct. 1048 (1976). In the instant case,the trial court made specific findings of fact that there was no evidence of any improper or illegal side agreement. In fact, the trial court found the handling of the grievances of the petitioners by the Union had been specifically approved by the petitioners. (P.9)

There is a strong federal policy favoring arbitration as a means of resolving labor disputes. There is no more

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* References to "P" are to pages in the Petition For A Writ Of Certiorari.

basic labor dispute than that of wages and hours worked. Where employees have submitted a wage and hour dispute, specifically including the question of the FLSA through a Grievance Committee; and a federal court has determined the submission and determination of the grievance to have been fair and proper, the strong federal policy of final determination of labor disputes by arbitration should be supported by following the rationale of *Satterwhite* v. *United Postal Service, Inc.*, 496 F 2d 448 (10th Cir. 1974) cert. denied 419 U. S. 1079 (1975), rather than encouraging the litigious and circuitious approach advocated by petitioners which prolongs the life of the dispute and promotes industrial strife and instability. Although counsel for petitioners are harshly critical of the grievance process, that process resulted in a resolution of the dispute between the parties within a relatively short time. In contrast, petitioners commenced this judicial action in 1973; have had it dismissed once for failure to prosecute, reinstated the suit and have managed to keep a relatively simple wage dispute unresolved for seven years.

2. The FLSA claim in this case is barred and is not properly before the court as a result of the failure of any of the petitioners to comply with the requirements of the FLSA.

No petitioner signed a written consewnt as required by 29 U.S.C. § 216(b) and 29 U.S.C. § 256 and no petitioner signed the complaint.

The case of *Burrell* v. *LaFollette Coach Lines*, 97 F. Supp. 279 (1951), was an action under the Fair Labor Standards Act to recover unpaid minimum wages. The complaint named thirty-two (32) individuals as plaintiffs. However, only one (1) of the thirty-two (32) named plaintiffs signed the complaint. The thirty-one (31)

other plaintiffs did not sign the complaint and did not file separate written consents to become parties to the action. In addition to the thirty-two (32) named plaintiffs, the complaint sought relief on behalf of all other similarly situated. However, the attempt to make the action a class action was abandoned prior to trial and the matter proceeded limited to the thirty-two (32) named parties. The court held that the action was a "collective" action and that the filing of the complaint was not a sufficient commencement of the action to stop the running of the statute of limitations as the thirty-two (32) plaintiffs who did not file separate written consents. Accordingly, the single plaintiff who executed the complaint was permitted to proceed, and the complaint was dismissed as to the thiryt-one (31) named plaintiffs who failed to sign the complaint or execute and file written consents with the court.

In the case of *Armstrong* v. *Reuben,* 1969, 298 N.Y.S. 2d 325, 31 A.D. 2d 913, the court was faced with a similar situation except the plaintiffs attempted to amend and file the written consents during trial. The appellate court held that it was error to permit the plaintiffs to file their consents, *nunc pro tunc,* during trial, after the passage of more than two (2) years since the accrual of the causes of action. In *LaChapelle* v. *Ownes, Illinois, Inc.,* 513 F. 2d 286 (1975), the Fifth Circuit Court of Appeals had occasion to construe 29 U.S.C. §216(b) as it relates to the failure of a person desiring to become a party plaintiff to execute and file his written consent. At page 288, the court said:

> "Under Section 16(b) of FLSA, on the other hand, no person can become a party plaintiff and no person will be bound by or may benefit from judgment unless he has affirmatively "opted into" the class; that is, given his written, filed consent. *Sims* v.

Park Davis & Co., 334 F. Supp. 774, 780-81 (ed. Mich.) affirmed 453 F. 2d 1259 (6th Cir. 1971) cert. denied 405 U.S. 978, 92 Sup. Ct. 1196."

In *Grosheck* v. *Babcock and Wilcox Tublar Products Div.*, 425 F. Supp. 232 (1977), and action was commenced under the Fair Labor Standards Act, 29 U.S.C. §216(b). A single plaintiff filed the suit, signed the complaint and filed his written consent to the action, as required by 29 U.S.C. §216(b). More than two (2) years after the filing of the suit, 119 additional employees tried to join the action by filing their consents. The trial court refused to permit this; notwithstanding the effect of such refusal was to bar the claims of the 119 employees because of the expiration of the statute of limitations. Only the single plaintiff was permitted to proceed.

3, The time spent by the employees for which compensation is sought does not require compensation. In *Tennessee Coal, Iron R.R. Co.* v. *Muscoda Local No. 123,* 321 U.S. 590, 64 S. Ct. 698, 88 L Ed., 949, rehearing denied 322 U.S. 771, 64 S. Ct. 1257, 88 L. Ed. 1596 (1944), this Court established a three-pronged test for determining hours worked for FLSA purposes: (1) The activity must require physical exertion; (2) Exertion must be controlled by the employer; and (3) The exertion must be pursued necessarily and primarily for the benefit of the employer.

The testimony in the instant case clearly established the inspection was not controlled by the employer but was solely under the control, as to time and manner, of the petitioners. The items to be inspected were established by the Department of Transportation and not by the employer. As noted by the 8th Circuit, the exertion was for the benefit of the motoring public and the employee

at least as much for the employer. (P. 27a) Thus, under the test of *Tennessee Coal, Iron R.R. Co.* the actual time spent would not constitute hours worked under the FLSA.

In *Leone* v. *Mobil Oil Co.*, 523 F. 2d 1153 (1975) (D.C. Cir.) the United States Court of Appeals for the District of Columbia had occasion to interpret *Tennessee Coal* in a case involving the application of the FLSA to time spent by employees participating in OSHA inspections. The District of Columbia Court said at page 1163:

> "In applying the *Tennessee Coal* test that the activity be controlled by the employer and primarily for his benefit, we find that employees accompanying an OSHA inspector fail to satisfy either requirement. It is true, as plaintiffs state, that furthering industrial safety benefits the employer. This benefit, however, does not require finding that the activity is *primarily* for the employer's benefit. Many activities which may increase employee effectiveness and thus benefit the employer and are not worktime activities under FLSA . . . ."

The case of *U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351, 91 S. Ct. Reporter 409 (1971) is distinguishable from the instant case in that the employee in *Arguelles* did not choose to submit his claim for seaman's wages, to the grievance procedure set forth in his collective bargaining agreement but instead initially filed suit in federal court. In holding that the seaman could pursue his remedy for wages in the manner chosen this Court said, at page 412:

> "It is also said that the informal, readily available grievance and arbitration procedures might defeat any overreaching and delay by the employer which § 596 was designed to reach. We do not hold that

> § 596 is the exclusive remedy of the seaman. He may, if he chooses, use the processes of grievance and arbitration. Yet, unlike Congress, we are not in a position to say that his interests usually will be best served through § 301 rather than through § 596."

Arguelles exercised his option and chose to pursue his remedy in federal court. In the instant case, the petitioners exercised their option and chose to pursue their remedy through the grievance process. Petitioners herein no more have the right to a second option by filing suit in federal court after the grievance committe's decision than would Arguelles had he been dissatisfied with the outcome in federal court and sought to commence a subsequent grievance proceeding based on the collective bargaining agreement. This concept was expressed by Mr. Justice Harlan in his concurring opinion at page 417 of *Arguelles* where he states:

> "I think it obvious that the least desirable of all solutions would be to create a necessity for suits in both forums. In this circumstance, I think conflicting congressional policies are best reconciled by construing 46 U.S.C. § 596 and § 301 of the Labor-Management Relations Act as securing to the seaman an option to choose between an arbitral and judicial forums where he states a claim under both contract and 46 U.S.C. § 596."

Further, although the petitioners scoff at the effectiveness of procedures under the grievance committee process, the dissenting opinions of Mr. Justice White, Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Marshall in *Arguelles*, at page 419 indicate otherwise:

> "The merits of respondents nonstatutory claims depend entirely on interpretation and application of

the bargaining agreement. Specifically, the threshold questions involved are (a) whether the respondent performed overtime work with the authorization of the master; (b) whether the crew was confined to ship because of the actions of government officials and if so whether respondent can base his claim on the alleged failure of the master to show the required documents to the crew, and (c) whether the ship had arrived "in port". . .An additional question is whether respondent was "paid" on February 17 or February 22, since the penalty accrues only until the date of payment.

"Most importantly, for purposes of this case, it is clear that the question of whether respondent was entitled to the statutory penalty depends entirely on a resolution of these questions. If if develops that petitioner has paid respondent all wages due him in a timely manner, the statutory penalty claim also disappears.

"These questions are particularly within the competence of the contractually established grievance procedure of the collective-bargaining agreement. They are all questions of fact or interpretation of various provisions of the agreement. There is not the slightest indication or contention that the grievance machinery would be unable to determine these questions, or that it would be inferior to a federal court in so doing. It is clear from the face of the claims that a familiarity with the customs and practices of shipping would be distinctly helpful in assessing the validity of the claims. This familiarity is of course, one of the prime attributes of an arbitrator."

And further, at page 421 of the dissent:

"In fact, this Court and lower federal courts have endorsed the suitability of arbitration to resolve federally created rights. In *Wilko* v. *Swan,* 346 U.S.

> expressed "hope for the (arbitration's) usefulness***in controversies based on statutes ***." *Id.*, at 432, 74 S. Ct., at 185. And courts of appeals both before and after passage of § 301 have required that Fair Labor Standards Act employee's claims for liquidated damages under 29 U.S.C. § 216(b) for failure to pay overtime wages be referred to contractual grievance prodecures before being presented to the court. *Donahue* v. *Susquehanna Collieries Co.*, 138 F. 2d 3 (CA 3 1943); *Evans* v. *Hudson Coal Co.*, 165 F. 2d 970 (CA 3 1948); *Beckley* v. *Teyssier*, 332 F. 2d 495 (CA 9 1964). *Cf. Fallick* v. *Kehr*, 369 F. 2d 899 (CA 2 1966); *Old Dutch Farms, Inc.* v. *Milk Drivers and Dairy Emp. Local Union No. 584, Intern. Broth. Of Teamsters, etc.* 243 F. Supp. 246 (EDNY 1965); *United States Steel Corp.* v. *Seafarers' Intern. Union of North America, etc.*, 237 F. Supp. 529 (EDPa.1965)."

In *Union de Tronquistos de Puerto Rico Local 901* v. *Flagship Hotel Corp.*, 554 F. 2d 8 (1st Cir. 1977), the 1st Circuit Court of Appeals reviewed both the *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L.Ed. 2d 147 (1974) decision and the decision in *Satterwhite* v. *United Postal Service, Inc., supra,* in the area of the FLSA. In agreeing that the *Satterwhite* decision is correct and does not conflict with *Alexander* v. *Gardner-Denver,* that court made the same distinction the 8th Circuit has made in the instant case, i.e., the holding in *Gardner-Denver* rests in part on the "highest priority" policy against racial discrimination which is expressed in Title VII.

While it may be good "briefsmanship" to attempt to arouse the passions of this court by repeatedly quoting out of context the phrase "mere wage dispute" in reference to the petitioners' FLSA claims, it is difficult to equate the wage claims of truck drivers who in

1978 were making between $28,000.00 and $30,000.00 a year with the rights of minorities who have been subjected to hundreds of years of discrimination. This difficulty is further compounded in considering that the instant petitioners are members of and were "fairly and properly represented" by the most powerful labor union in the United States. To state that the social, economic, political and pure muscle positions of the employee petitioners and the minorities to be protected under Title VII are the same and require the same judicial protection or review is unrealistic.

It is unlikely that any union's interest in the enforcement of the rights quaranteed by Title VII was or is as intense as the union's interest in enforcement of the rights guaranteed under the FLSA. This obvious difference between the two was acknowledged and addressed by Congress in affording the protections of Title VII against unions as well as against employers. No such protections against unions were thought necessary to be afforded under the FLSA.

The expertise necessary to prepare and prove a case of racial discrimination may well be so complex that only the federal courts have the knowledge, experience and flexibility of remedy to deal with an often subtle and insidious situation. The same considerations are not true in the area of the FLSA. Here rather it is the arbitrator or the grievance committee with its specialized knowledge and experience which is more familiar with the actual working conditions; the procedures, methods and manners by which jobs are accomplished.

The approach of the 10th Circuit Court of Appeals in the *Satterwhite* case should be adopted by this Court. *Satterwhite* correctly analyses the relationship of the

conflicting statutes and the conflicting policies of the United States. See page 450:

> "The acceptance of the Court's analysis and reasoning in Gardner-Denver does not solve our problem unless we equate the wages and hours provisions of FLSA with the anti-discrimination provisions of Title VII. Strong national policy is expressed both in Title VII, 94 S. Ct. at 1019, and in FLSA, see 29 U.S.C. § 202, and *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 706-707, 65 S. Ct. 895, 89 L.Ed. 1296. These policies, each in its turn, should be balanced against the federal policy favoring arbitration of labor disputes.
>
> "In a number of respects FLSA is importantly different from Title VII. Gardner-Denver refers to the significant role of private individuals in the enforcement of Title VII rights. . . .In *Employees, etc.* v. *Department of Public Health and Welfare of Missouri,* 411 U.S. 279, 286, 93 S. Ct. 1614, 1618, 36 L.Ed. 2d 251, the Court said that, "*** private enforcement of the (FLSA) was not a paramount objective ***."The independent statutory remedies in Title VII evince an intent to accord parallel or overlapping relief apart from contractual processes. The absence of such procedures in FLSA suggests a greater reliance on contract remedies and a lesser emphasis on individual enforcement.
>
> ". . .It established the defense of good faith reliance on administrative regulations. . .and declared the congressional policy "to protect the right of collective bargaining and *** limit the jurisdiction of the court." . . . The
> 288
> point is that in certain circumstances good faith is a defense to an FLSA action. The defense, however, is not available in Title VII actions. . . . The Portal-to-Portal Act speaks to the protection of collective bargaining. Gardner-Denver says that . . ."Title VII does not speak expressly to the

relationship between federal courts and the grievance-abritration machinery of collective-bargaining agreements." The different approach to the defense of good faith and the different emphasis on collective bargaining indicates that Congress intended that wage disputes and racial disputes should not receive the same treatment."

And further at page 451:

"Wages and hours are at the heart of the collective-bargaining process. They are more akin to collective rights than to individual rights, and are more suitable to the arbitral process than Title VII rights. Gardner-Denver says, 94 S. Ct. at 1024, that "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land," and that "judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." We are concerned with rate of pay, an issue which does not require, or lend itself to, public law considerations. The added fear expressed in Gardner-Denver that harmony between a union and an individual cannot be presumed "where a claim of racial discrimination is made," 94 S. Ct. at 1024 n. 19, has no pertinence here. One of the highest objectives of any union is to get all the money possible for all of its members."

Finally, at page 451:

"The ever-present disputes over wages and hours are readily adaptable to arbitration. Resort to judicial process after arbitration prolongs the controversy and serves no good purpose when the arbitral and judicial proceedings arise out of, and must be decided on, the same factual background."

Factually, *Alexander* v. *Gardner-Denver Co.* is distinguishable and nonapplicable to the instant case because in *Alexander* v. *Gardner-Denver Co.* the sub-

mission of the discrimination charge to the grievance process was in the format of a submission of a claim for a breach of an antidiscrimination clause in the contract. No claim for a violation of Title VII was submitted to the grievance committee. In the instant case, the petitioners not only submitted their contract violation claim to the grievance machinery but also submitted separate claims for violations of the federal wage laws. See *Alexander* v. *Gardner-Denver Co.* at page 1021:

> "The actual submission of petitioner's grievance to arbitration in the present case does not alter the situation. Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement, mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver."

Although the petitioners state at page 15 of the brief that employees who determine to initially file suit are placed in an unenviable position of having to risk dismissal for failing to exhaust grievance procedures, there is no evidence to support that contention. There is nothing in the record to establish that the contract permits dismissal for failure to exhaust grievance procedures or that the question has ever been raised. Even though these employees have apparently violated the finality provisions of the contract they have not been fired.

CONCLUSION

Respondent, Arkansas-Best Freight System, Inc., prays the petition be denied and for its costs.

Respectfully submitted,

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